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In the Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY, ET AL., PETITIONERS

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), should compel dismissal of a claim for damages under the Sherman Act (15 U.S.C. 1) in an action brought by shippers alleging that carriers engaged in conduct that clearly violated a rate bureau agreement approved by the Interstate Commerce Commission.

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INTEREST OF THE UNITED STATES

The issue in this case is whether this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), should be applied to bar an antitrust damage action based on conduct that, absent the implied immunity created in *Keogh*, would violate the Sherman Act. The United States has primary responsibility for enforcement of the antitrust laws. It therefore has a substantial interest in urging that immunities from the antitrust laws be recognized only where essential to the attainment of other congressional regulatory objectives and only to the extent intended by Congress.

STATEMENT

1. Petitioners are two corporations that purchased trucking services from respondent motor carriers. The carriers are members of respondent Niagara Frontier Tariff Bureau, Inc. (NFTB), a rate bureau that operates pursuant to an Agreement approved by the Interstate Commerce Commission (ICC). Under the Agreement, respondents may set rates collectively and, if they comply with various

notice and hearing and record-keeping requirements set forth in the Agreement and ICC regulations, the Reed-Bulwinkle Act immunizes their conduct from challenge under the antitrust laws. See 49 U.S.C. 10706.[1]

In 1983 petitioners filed separate class action complaints[2] alleging that respondents had violated the Sherman Act, 15 U.S.C. 1 *et seq.*, by conspiring during a fifteen year period to " 'fix, raise and maintain prices and to inhibit or eliminate competition * * * without complying with the terms of the NFTB [A]greement and by otherwise engag[i]ng in conduct that either was not or could not be approved by the ICC.' " Pet. App. 39a (emphasis and citation omitted). Specifically, the complaints alleged that the tariffs filed by respondents through the NFTB were set by a clandestine "Principals Committee" in violation of the Agreement. Petitioners also claimed that respondents resorted to "threats, coercion and retaliation" to prevent

[1] 49 U.S.C. 10706, as amended, codifies Section 5a of the Reed-Bulwinkle Act, ch. 491, 62 Stat. 472. It provides that an ICC-approved agreement among carriers "may be * * * carried out under its terms and under the conditions required by the [ICC], and the Sherman Act * * * do[es] not apply to parties and other persons with respect to making and carrying out the agreement." The Agreement in this case was approved by the ICC in *Niagara Frontier Tariff Bureau, Inc.—Agreement*, 297 I.C.C. 494 (1955).

[2] The complaints, originally filed in the United States District Court for the District of Columbia, were transferred to the Western District of New York, where a complaint filed by the United States containing essentially the same allegations was then pending. The government suit resulted in a consent decree enjoining respondents from discussing rates "except within an authorized ratemaking body of a rate bureau with a rate agreement," and from "harassing, discouraging, coercing, or threatening in any way any motor carrier to withdraw, forbear from filing, or modify in any way said carrier's planned or actual independent rates." *United States* v. *Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66, 167, at 66,533 (W.D.N.Y. 1984).

carriers from exercising their statutory right to file tariffs independently.[3] Pet. 3. Petitioners sought monetary and injunctive relief.

Respondents moved for judgment on the pleadings, arguing that petitioners' damages claims were barred by *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922). The district court found *Keogh* controlling and dismissed the complaints in their entirety. Pet. App. 43a-50a.[4]

2. The court of appeals, in an opinion by Judge Friendly, affirmed in part, and reversed in part. Pet. App. 1a-41a.

Point-by-point, the court of appeals explained why the four factors that formed the basis for the holding in *Keogh* "do not seem so compelling today as they did in 1922." Pet. App. 9a. First, in response to the concern expressed in *Keogh* (260 U.S. at 163) that antitrust damages might operate as a rebate, creating forbidden discrimination among shippers, the court of appeals observed that such fear was "scarcely applicable to class actions" that provide more uniform relief. Pet. App. 10a. Second, *Keogh* referred to the difficulty of determining whether the ICC would have approved a "hypothetical lower rate" proposed as the benchmark for assessing antitrust damages. Pet. App. 11a. The court of appeals noted (*ibid.*) that this concern was answered by "many later cases" referring "similar issues to the ICC." *Ibid.* The third factor in the *Keogh* rationale was the burden of proving injury because lower rates might have been passed on to shippers' customers. 260 U.S. at 165. But, as the court of appeals commented (Pet. App. 12a), this Court has itself labeled as dictum *Keogh*'s reference to "passing-on" (*Hanover Shoe, Inc.* v. *United*

[3] Under Section 5a(1)(B)(6) of the Reed-Bulwinkle Act (62 Stat. 473), a rate bureau agreement must afford each carrier "the free and unrestrained right to take independent action either before or after any determination arrived at" collectively.

[4] The district court also concluded that the petitioners' allegation of a "broader conspiracy" to inhibit competition involving conduct not related to rates was insufficient to avoid dismissal under *Keogh*. Pet. App. 48a-50a.

Shoe Machinery Corp., 392 U.S. 481, 491 n.8 (1968)), and recent decisions of this Court appear to reject that rationale altogether. See *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 723-726 (1977); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972); *Hanover Shoe, Inc.*, 392 U.S. at 487-494.

The court of appeals also questioned as "no longer seem[ing] so self-evident" *Keogh*'s central premise—that a rate the ICC has determined to be "legal" cannot be illegal under the antitrust laws. Pet. App. 13a. The existence of a "zone" within which a rate might fall and still pass muster under the Interstate Commerce Act would allow shippers to base an antitrust action on the difference between the rate actually charged and the "lower but still reasonable rate that would have prevailed under free competition." *Ibid.* Moreover, the court noted (*ibid.* (citation omitted)) that post-*Keogh* precedent had firmly established that "implied exemptions to antitrust liability are 'strongly disfavored,' " and that "activity could be challenged under the antitrust laws despite the existence of an administrative agency with authority to regulate the activity." Finally, the court concluded (Pet. App. 15a) that "[t]he case for reaching a contrary conclusion today to that reached" in *Keogh* "is particularly strong in light of recent statutes which rely increasingly on competition rather than regulation to insure the reasonableness of rail and motor carrier rates."

Although the court of appeals found (Pet. App. 3a) "much of the reasoning of *Keogh* * * * outdated," it held that *Keogh*'s "language has not been overruled and that if there is to be an overruling, that task is for the Supreme Court." Pet. App. 3a. Moreover, the court of appeals noted that *Keogh* could not be distinguished because its holding was not limited to situations where "rates had been investigated and approved by the ICC," but precluded private antitrust actions "whenever tariffs have been filed."

Id. at 6a-7a. Accordingly, the district court's order was affirmed insofar as it dismissed damage claims based on the respondents' rate-fixing activities.[5]

SUMMARY OF ARGUMENT

The complaints in this case alleged that respondents engaged in conduct that is illegal per se under the antitrust laws and outside the scope of their ICC-approved Agreement.[6] The court of appeals, despite its serious doubts about the continued soundness of *Keogh*, concluded that it had no choice but to affirm the district court's dismissal of the rate-related portions of the complaints. The question before this Court is whether, on the facts of this case, *Keogh* continues properly to accommodate the objectives of the antitrust laws and the Interstate Commerce Act. We submit that it does not.

Developments in antitrust and other areas of the law have substantially eroded the foundations of *Keogh*. In the 63 years since *Keogh* was decided, this Court has specifically addressed each of the reasons advanced in that case for barring antitrust damage actions. These post-*Keogh* precedents clearly establish that none of the factors relied on in *Keogh* is either controlling or persuasive today.

Keogh's categorical prohibition of antitrust damage actions is also inconsistent with this Court's repeated holdings that implied antitrust immunity is disfavored and should be granted only if there is a "plain repugnancy" between the antitrust laws and a regulatory statute. There is

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[5] As to petitioners' claims for injunctive relief, however, the court of appeals reversed. It indicated that petitioners should be allowed to amend their complaints "to state claims for damages other than damages arising from the filed tariffs." Pet. App. 36a-40a.

[6] Because the complaints were dismissed on the pleadings, petitioners' allegations must for present purposes be taken as true. See, *e.g.*, *Hughes* v. *Rowe*, 449 U.S. 5, 10 (1980).

no repugnancy here between the Sherman Act and the Interstate Commerce Act. Congress has provided express statutory immunity for collective ratemaking undertaken in conformity with an ICC-approved agreement; ratemaking outside the scope of such an agreement is naked price fixing. Thus, the conduct alleged in the complaints subverts both the objectives of the antitrust laws and the regulatory scheme. Allowing private damage actions in a case such as this would not subject carriers to duplicative or inconsistent standards, frustrate the operation of the Interstate Commerce Act, or interfere with the ICC's exercise of its regulatory authority.

The availability of private damage actions would in fact further the regulatory objectives of both the Sherman Act and the Interstate Commerce Act. Their availability would serve as a powerful incentive for carriers to comply strictly with the requirements imposed by Congress for express statutory immunity. Where carriers fail to comply with those requirements, damage actions would further the fundamental national policies underlying the antitrust laws. The availability of this antitrust remedy is especially important now, for in this and several other once-pervasively regulated areas, Congress has determined that competition rather than regulation will best serve consumer welfare. The continued application of *Keogh*'s categorical ban on private antitrust enforcement would frustrate this legislative policy.

ARGUMENT

I. *KEOGH* IS INCONSISTENT WITH SUBSEQUENT DECISIONS OF THIS COURT AND IS NO LONGER NECESSARY TO ACCOMMODATE THE SHERMAN ACT AND THE INTERSTATE COMMERCE ACT

Keogh is an early example of this Court's pragmatic efforts to harmonize congressional objectives in the Sherman Act with those of a regulatory statute. Thus, *Keogh*

was in fact, if not in name, an "implied antitrust immunity" case. Since 1922, however, this Court has shaped many contours of antitrust and regulatory law that were vague and uncertain when *Keogh* was decided, and class action remedies have been developed. As a result, the difficulties perceived in *Keogh* as warranting implied prohibition of a damage action in a case such as this have been resolved or deemed irrelevant. Over the same period of time, moreover, this Court has concluded that implied antitrust immunity should be conferred only upon the clearest showing of a conflict between the Sherman Act and another federal statute. These parallel developments undercut the rationale relied on in *Keogh*, and render that decision obsolete and its continued application anomalous.

A. Post-*Keogh* Developments Establish That None Of The Factors Relied On In *Keogh* Is Persuasive Today

1. In *Keogh*, a shipper brought an antitrust action alleging that various railroads had violated the Sherman Act by conspiring to fix tariffs that were filed with and ultimately approved by the ICC.[7] This Court held that a shipper could not maintain a private antitrust damage action for rates filed with the ICC. Four reasons were advanced for this conclusion. First, because the Interstate Commerce Act provided shippers with an opportunity to challenge rates as "unreasonably high or discriminatory," Congress could not have "intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust" laws. 260 U.S. at 162. Second, antitrust damage awards would, "like a rebate, operate to give" an individual shipper "a preference over his trade competitors," and thereby contravene the Interstate Commerce Act's objective of "prevent[ing] * * * unjust discrimination" among shippers. *Id.* at 163. Third,

[7] Keogh had challenged the tariffs at issue in several proceedings before the ICC (260 U.S. at 160-161), and the Commission had, "after extensive hearings * * * approved" the rates. *Id.* at 160.

because there was "no conceivable proceeding" whereby the ICC could pass on the validity of a rate posited for the purpose of calculating antitrust damages (*id.* at 164), the shipper would be unable to sustain its burden of proof as to damages. Finally, the shipper's damages were "purely speculative" (*ibid.*), because the benefit of a lower rate "might have gone to [its] customers or conceivably, the ultimate consumer." *Id.* at 165.

2. This Court, though it has had no occasion explicitly to reconsider *Keogh,*[8] has in various cases subsequent to *Keogh* considered every one of the factors relied on in that decision. These precedents, taken together with intervening procedural and administrative developments, undermine the rationale of *Keogh.*

a. *Keogh*'s first premise—that because Congress provided a regulatory remedy it could not have intended also to provide an antitrust remedy—is not tenable today. Whatever the merit of such a view in 1922, when federal regulation was limited and the applicability of the antitrust laws to regulated conduct was unclear,[9] in today's era of

[8] *Keogh* has been cited in passing in various recent decisions of this Court, but in none of these cases was *Keogh* controlling. See *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 243 (1980) (noting that "inability to prove * * * legally cognizable damages" may limit relief available in an antitrust action, but does not divest court of jurisdiction; citing *Keogh*); *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 299-300 & n.12 (1973) (noting that conduct is often subject to both antitrust laws and regulatory scheme; citing *Keogh* along with ten other implied immunity cases); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 260 (1972) (citing *Keogh* in the course of explaining the holding in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945)).

[9] Although *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290 (1897), and *United States* v. *Joint-Traffic Association,* 171 U.S. 505 (1898) had held that private agreements among railroads to fix rate levels and divide revenues were subject to government enforcement actions, the legality of industry-wide, collective ratemaking was uncertain in 1922. Indeed, at the time *Keogh* was decided the ICC

extensive federal administrative regulation[10] this approach would vitiate the "fundamental national policies" embodied in the antitrust laws. *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 374 (1973).

Thus, in numerous cases decided since *Keogh,* this Court has consistently rejected the notion that the availability of an administrative remedy, standing alone, evinces a congressional intent to deny relief under the antitrust laws. See, *e.g., Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 224 (1966) (availability of reparations under the Shipping Act does not preclude damage award in antitrust suit); *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 373-375 (1973) (agency's authority to compel interconnection does not preclude court from ordering same relief in an antitrust action); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 351-352 (1963) (banking agency's approval of merger does not bar Clayton Act challenge); *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963) (neither the Securities Ex-

was, at the direction of Congress, investigating the competitive impact of collective ratemaking by one of the largest rate bureaus of the time. The ICC ultimately concluded that the bureau's operation was consistent with the regulatory objectives of the Interstate Commerce Act. See *In re Trans-Continental Freight Bureau,* 77 I.C.C. 252, 279 (1923). With the ICC's approval, motor carriers adopted the collective ratemaking practices of the railroads after the passage of the Motor Carrier Act, 1935, ch. 498, 49 Stat. 543 *et seq.*. See 1936 ICC Ann. Rep. 74.

The legality under the antitrust laws of collective ratemaking thus remained unclear until 1945, when this Court held in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 458 (1945), that collective ratemaking resulting in "discriminat[ion] against a State or a region * * * [or] coercion in the fixing of rates" could be enjoined under the Sherman Act. As will be discussed more fully (pages 21-22, *infra*), Congress responded to *Georgia* by passing the Reed-Bulwinkle Act, which provided express statutory immunity for authorized collective ratemaking activities.

[10] See 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 224f, at 157 (1978).

change Act nor stock exchange rules posed a legal barrier to antitrust action); *California* v. *FPC,* 369 U.S. 482 (1962) (Clayton Act not displaced by the Natural Gas Act); *United States* v. *RCA,* 358 U.S. 334, 344 (1959) (FCC approval of license exchange does not preclude antitrust suit); *United States* v. *Borden Co.,* 308 U.S. 188, 195-199, 205-206 (1939) (neither the Agricultural Adjustment Act nor the Capper-Volstead Act displaced the Sherman Act).[11]

b. Similarly, this Court's more recent decisions, coupled with other changes in the law, have effectively allayed the concern expressed in *Keogh* that antitrust damages are inimical to a regulatory scheme aimed at preventing discrimination among shippers at the hands of carriers. In *Keogh,* an individual shipper-plaintiff was challenging tariffs that had been specifically approved by the ICC

[11] In keeping with this Court's teaching, lower courts have also repeatedly rejected arguments that a regulatory remedy precludes antitrust relief. See, *e.g., Strobl* v. *New York Mercantile Exchange,* 768 F.2d 22, 29-30 (2d Cir. 1985); *MCI Communications Corp.* v. *AT & T,* 708 F.2d 1081, 1102-1103 (7th Cir.), cert. denied, 464 U.S. 891 (1983); *Phonetele, Inc.* v. *AT & T,* 664 F.2d 716, 734-735 (9th Cir. 1981), cert. denied, 459 U.S. 1145 (1983).

These decisions, of course, represent a complete about-face from the presumption relied on in *Keogh*. It is now established that the canon of construction that " '[i]mmunity from the antitrust laws is not lightly implied' * * * reflects the felt indispensable role of antitrust policy in the maintenance of a free economy." *Philadelphia National Bank,* 374 U.S. at 348 (quoting *California* v. *FPC,* 369 U.S. at 485). Thus, absent an explicitly stated legislative intent to the contrary, antitrust and regulatory remedies are not mutually exclusive. Indeed, this Court recently described a regulatory landscape in which both administrative and antitrust damages would be available to motor carriers under the circumstances presented here. *ICC* v. *American Trucking Associations, Inc.,* No. 82-1643 (June 5, 1984), slip op. 6 (upholding ICC's authority to nullify retroactively motor carrier tariffs filed in violation of an ICC-approved Agreement, noting that "[w]henever the Commission finds an effective tariff unlawful, injured parties can recover both damages under [the Interstate Commerce Act] and whatever additional amounts the antitrust laws allow" (see also slip op. 7 (O'Connor, J., dissenting)).

after "extensive hearings" (260 U.S. at 160) and it was in this context that the Court expressed the view that antitrust damages might amount to a "rebate" or "preference." But in *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966), the Court squarely and unanimously rejected the notion that antitrust damages would do violence to a statutory scheme aimed at preventing discrimination among shippers. In *Carnation*, as here, the rates did not have specific agency approval, and had been fixed in a manner that did not qualify for express statutory immunity.[12] In holding that shippers were entitled to seek antitrust damages despite the Shipping Act's ban on discrimination,[13] the Court concluded that "Congress was concerned with assuring equality of treatment by [carriers], not with equality of treatment by juries in collateral proceedings." 383 U.S. at 219 n.3. Thus, *Carnation* expressly rejected the assumption, implicit in *Keogh*, that "Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others" (*ibid.*).[14] *Carnation*'s conclusion that it would be unfair to allow carriers to shield their wrongdoing by invoking a statutory provision designed to protect *shippers* is, moreover, con-

[12] Section 15 of the Shipping Act, 1916, 46 U.S.C. App. (Supp. I) 814, like the Reed-Bulwinkle Act, immunizes collective ratemaking undertaken pursuant to an Agreement approved by the regulatory agency.

[13] See § 17, 46 U.S.C. App. (Supp. I) 816.

[14] Although *Carnation* did not "overrule" *Keogh,* it clearly rejected *Keogh*'s suggestion that antitrust damages were unavailable in all cases where a regulatory scheme prohibited discrimination. *Keogh* was cited throughout the briefs in *Carnation,* and the respondent in *Carnation* explicitly argued that *Keogh* was controlling in this regard. See Resp. Br. at 48, 59-60, *Carnation Co.* v. *Pacific Westbound Conference, supra.*

sistent with the ICC's longstanding view that the Interstate Commerce Act's prohibition of discrimination is intended solely for the benefit of shippers.[15]

Moreover, the availability of class actions under Fed. R. Civ. P. 23 has eliminated the possibility that antitrust damage actions might advantage one shipper over others, as the court of appeals correctly recognized (Pet. App. 10a-11a).[16] Rule 23 was designed to address the problem that troubled this Court in *Keogh*: the possibility that similarly situated plaintiffs would receive varying treatment at the hands of different factfinders. See Fed. R. Civ. P. 23(b)(1)(A) advisory committee note (1966 Amendment) (class action available where "[a]ctions by or against a class provide a ready and fair means of achieving unitary adjudication"); 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1773, at 10 (1972) ("[t]his portion of the rule * * * clearly embraces cases in which the party is obliged by law to treat the class members alike"). There is therefore no longer a reasonable basis to fear that piecemeal litigation will result in lack of uniformity and, ultimately, in discrimination among shippers.

c. Time has also rendered obsolete *Keogh*'s concern that, because there was "no conceivable proceeding" in which the ICC could pass on the validity of a hypothetical rate, a shipper-plaintiff would be unable to prove that a

[15] See *Petition for Declaratory Order—Lawfulness of Volume Discount Rates by Motor Common Carrier of Property*, 365 I.C.C. 711, 715 n.6 (1982) (citing cases). Indeed, the ICC has expressed doubt whether carriers even have standing to challenge a tariff on the ground that it might, as a theoretical matter, result in discrimination. *Ibid.* The ICC's interpretation of the "statutory scheme it is entrusted to administer," is of course entitled to "considerable weight." *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 6 (footnote omitted); see also *United States* v. *Shimer*, 367 U.S. 374, 382 (1961).

[16] Although class actions or "representative suits" were not unknown prior to the adoption of Rule 23 in 1938, see, *e.g.*, *Christopher* v. *Brusselback*, 302 U.S. 500 (1938), they were not common, and they were generally limited to equitable rather than legal causes of action. See Z. Chafee, *Some Problems of Equity* 199 (1950); 7 C. Wright & A. Miller, *supra*, § 1751, at 506. But the possibility that a class action of sorts might have been maintained in 1922 did not render *Keogh*'s fear of inconsistent verdicts groundless; the res judicata effect of class action judgments was unclear for quite some time even under Rule 23. 7 C. Wright & A. Miller, *supra*, § 1751, at 509-510. Indeed, prior to the extensive amendments to Rule 23 in 1966, a class action suit " 'was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation which might or might not be accepted.' " *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 546 (1974) (citation omitted). The 1966 amendments were designed, in part, "to assure that members of the class would be * * * bound by all * * * orders and judgments." 414 U.S. at 547 (footnote omitted).

lower rate posited for the purpose of calculating antitrust damages would have been lawful under the Interstate Commerce Act (260 U.S. at 164). As the court of appeals observed, since *Keogh* was decided this Court itself has in "many * * * cases * * * directed the suspension of judicial proceedings pending the referral of similar issues to the ICC" (Pet. App. 11a).[17] It is now well settled that the ICC can pass on the reasonableness of tariffs in response to a reference from a pending judicial proceeding. See, *e.g.*, *United States* v. *Consolidated Freightways Corp.*, 340 I.C.C. 208 (1971); *Glama Dress Co.* v. *Mid-South Transports, Inc.*, 335 I.C.C. 586 (1969). See generally *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M.C.C. 337, 340-342 (1944).[18]

[17] See, *e.g.*, *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962); *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 203-206 (1960); *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 62-70 (1956); *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940). See also *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) (antitrust action stayed pending administrative determination of validity of defendant's conduct under regulatory statute).

[18] Although this Court held in *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959), that reparations were unavailable to shippers under either the Motor Carrier Act or at common law, *T.I.M.E.* did not in-

d. Finally, *Keogh*'s supposition that a shipper's damages were "purely speculative" (260 U.S. at 164), because a lower rate might have been "passed on" to its customers has subsequently been rejected by this Court. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 n.8 (1968), the Court characterized that statement in *Keogh* as "dictum." And this Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 723-726 (1977), established that *only* those parties who, like petitioners, purchase services directly from a defendant can recover antitrust damages.[19] Moreover, in numerous cases decided after *Keogh*, this Court has emphasized that an antitrust plaintiff is not required to demonstrate the amount of its

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validate the reference procedure outlined in *Bell Potato Chip* and earlier ICC cases. See *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. at 89 (citing *Bell Potato Chip* with approval in case where reasonableness of routing practice was referred to ICC for determination pursuant to district court action).

In response to *T.I.M.E.*, Congress amended the Motor Carrier Act in 1965 to authorize reparations for shippers. See 49 U.S.C. (1970 ed.) 304a; *Middlewest Motor Freight Bureau* v. *United States,* 433 F.2d 212, 232-233 (8th Cir. 1970), cert. denied, 402 U.S. 999 (1971). The ICC, however, still has no authority under the Motor Carrier Act to award reparations; such suits must be brought in a district court, and the issue of reasonableness is then referred to the ICC to be resolved in an administrative proceeding, in accordance with the doctrine announced in *Bell Potato Chip.*

[19] *Keogh*'s reliance on a "pass-on" rationale to deny damages ignored the fact that "[e]ven if a buyer prices for resale simply by marking up the purchase price, the higher price at which it must resell may reduce its volume of sales, and hence its profit." L. Sullivan, *Handbook of the Law of Antitrust* § 252, at 789 (1977). Indeed, four years before *Keogh* was decided the Court had explicitly rejected the contention that railroad shippers were not entitled to reparations because they were able to "pass-on" unreasonable rates to their customers. *Southern Pacific* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918). *Keogh* distinguished *Southern Pacific* on the ground that the ICC had declared in that case what rate would have been "reasonable." 260 U.S. at 165.

damages with "mathematic precision."[20] As the Court noted in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 565-566 (1931), quoting *Straus* v. *Victor Talking Machine Co.*, 297 F. 791, 802 (2d Cir. 1924), " '[t]he constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery.' "

B. Damage Suits For Price-Fixing In Violation Of An ICC-Approved Ratemaking Agreement Would Not Interfere With The Operation Of The Interstate Commerce Act Or The ICC's Regulatory Authority

Because *Keogh*'s stated rationale no longer justifies its bar against antitrust damage actions by shippers, *Keogh* can retain vitality only if its holding conforms to this Court's prevailing standards governing the recognition of implied antitrust immunity. The application of those standards to the statutory scheme at issue here compels the conclusion that respondents are not entitled to implied immunity from Sherman Act damage actions.

1. Because the antitrust laws embody "fundamental national policies" favoring competition (*Otter Tail Power Co.* v. *United States,* 410 U.S. at 374), implied immunity is appropriate only where there is a "plain repugnancy between the antitrust and regulatory provisions" (*United States* v. *Philadelphia National Bank*, 374 U.S. at 350-351 (footnote omitted)) and even then "only to the minimum extent necessary [to] make the [statutory scheme] work" (*Silver* v. *New York Stock Exchange*, 373 U.S. at 357). In short, as this Court noted in *Goldfarb* v. *Virginia State*

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[20] See, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-125 (1969); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 & n.7 (1962); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 263-265 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 561-566 (1931); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 378-379 (1927).

Bar, 421 U.S. 773, 787 (1975), "our cases have repeatedly established that there is a heavy presumption against implicit exemptions." See also *Union Labor Life Insurance Co.* v. *Pireno,* 458 U.S. 119, 126 (1982); *National Gerimedical Hospital & Gerontology Center* v. *Blue Cross,* 452 U.S. 378, 388-389 (1981); *FMC* v. *Seatrain Line, Inc.,* 411 U.S. 726, 733 (1973).

This presumption against implied antitrust immunity "reflects the felt indispensable role of antitrust policy in the maintenance of a free economy" (*Philadelphia National Bank,* 374 U.S. at 348), and is particularly compelling where, as here, Congress has crafted a regulatory scheme that provides for express antitrust immunity. In such circumstances the scope of immunity should not extend beyond the limits laid down by statute, because "[i]f Congress had desired to grant any further immunity, Congress doubtless would have said so." *United States* v. *Borden Co.,* 308 U.S. at 201. See also *California* v. *FPC,* 369 U.S. at 485. It strains credulity to suggest that, in granting express immunity in the Reed-Bulwinkle Act for collective ratemaking undertaken in conformity with an ICC-approved agreement, Congress also intended to immunize at the same time conduct *not* in conformity with such an agreement, which subverts *both* the Reed-Bulwinkle Act and the Sherman Act. While we agree with the court of appeals that Congress did not overrule *Keogh* in passing the Reed-Bulwinkle Act (see Pet. App. 25a), there is conversely no indication that it intended to fix by legislative fiat the balance this Court struck in 1922 between the Interstate Commerce Act and the antitrust laws.[21] Thus, as in any case where Congress has provided for express statutory immunity, conduct outside the scope of congressional authorization is presumptively not entitled to antitrust immunity.

[21] In passing the Reed-Bulwinkle Act, Congress delineated with precision the forms of collective ratemaking that are immune from antitrust challenge. For that reason, the various references in that Act's legislative history to then-prevailing antitrust law amount to no more than a confirmation that conduct outside the scope of express immunity would be subject to antitrust scrutiny. The issue here is whether *Keogh*'s judicially-crafted immunity remains necessary to accommodate the Sherman Act and the Interstate Commerce Act, and there is therefore no reason to assume that Reed-Bulwinkle "cast in bronze" the rule announced in *Keogh. City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 421 n.2 (1978) (Burger, C.J., concurring). Such an assumption would be particularly inappropriate given the long tradition of dialogue between the judicial and legislative branches that has served to perfect and preserve the vitality of the antitrust laws. See, *e.g., Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 229-235 (1948). Compare *Carnation,* 383 U.S. at 220-222, with *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1932), and *Far East Conference* v. *United States,* 342 U.S. 570 (1952).

2. This case satisfies none of the criteria that this Court has recognized as warranting implied immunity. There is no "clear repugnancy" between damage actions and the Interstate Commerce Act, and no possibility that antitrust damage actions would interfere with the operation of the regulatory scheme, or subject respondents to "duplicative and inconsistent standards." See *United States* v. *National Association of Securities Dealers, Inc.* 422 U.S. 694, 735 (1975).

a. An antitrust damage award premised on a rate lower than that filed by a carrier would not necessarily pose even a theoretical inconsistency with the ICC's regulatory authority. As the court of appeals correctly noted (Pet. App. 14a n.3),[22] the fact that a particular tariff filed in violation of an ICC-approved agreement may be

[22] Unlike the situation in *Southern Motor Carriers Rate Conference* v. *United States,* No. 82-1922 (Mar. 27, 1985), where the challenged conduct was contemplated under a state regulatory scheme, here it is alleged that respondents violated the ICC-approved ratemaking Agreement. Of course, the present case does not implicate the considerations of comity that informed the Court's decision in *Southern Motor Carriers.*

"reasonable" does not establish that a lower tariff is unreasonable. There is a "zone of reasonableness * * * between maxima and minima within which a carrier is ordinarily free to adjust its charges." *United States* v. *Chicago, M., St. P. & Pac. R.R.*, 294 U.S. 499, 506 (1935). Because there is a range within which rates may fall and still satisfy the controlling statutory criteria,[23] the calculation of antitrust damages based on rates different from those filed with the ICC but still within this range would not violate the rate structure or infringe upon the ICC's authority.

Moreover, the ICC has long taken the position (*Rules to Govern the Assembling & Presenting of Cost Evidence*, 337 I.C.C. 298, 378 (1970)) that its

> statutory scheme of ratemaking still generally leaves the initiative to the carriers. Indeed, it is their responsibility, in the first instance, to set appropriate rates and they are free to initiate such changes as they deem proper in their managerial discretion. The Commission is not, and was never meant to be, the manager of the operations of regulated carriers.

Because "the initial decision to publish a rate is, ordinarily, made by a carrier pursuant to its managerial discretion" (*id.* at 306), application of the antitrust laws would in no way usurp the regulatory prerogatives of the ICC. See, *e.g.*, *Otter Tail Power Co.* v. *United States*, 410 U.S. at

[23] A tariff is not unreasonable simply because it is higher or lower than a tariff filed by another carrier or carriers involving the same transportation. See, *e.g.*, *Household Goods Rates of Jacob's Van Line*, 17 M.C.C. 293 (1939); *Household Goods Rates of A.D. Rymers & Sons*, 12 M.C.C. 541 (1936). Differences among tariffs are also insufficient, standing alone, to support an inference that there has been an impermissible "preference or prejudice." See, *e.g.*, *Clama Dress Co.*, 335 I.C.C. at 596 ("Commission has frequently held that preference and prejudice are not prohibited unless they are undue or unreasonable. To be undue they must be shown to be a source of advantage to the parties or traffic alleged to be favored.").

374 (where challenged conduct results from the exercise of "business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override" the antitrust laws); *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 737 (1973).

b. It is extremely unlikely that damage actions would result in any actual interference with the ICC's exercise of its regulatory authority. Obviously, an "award of treble damages for past and completed conduct which clearly violated" an ICC-approved agreement would "certainly not interfere with any future action of the Commission." *Carnation*, 383 U.S. at 222. And it is plain that there is little or no danger that antitrust suits would conflict with any prior ICC determinations, because, as this Court noted in *ICC* v. *American Trucking Associations, Inc.*, No. 82-1643 (June 5, 1984), slip op. 6 n.4, the ICC is currently capable of reviewing only an insignificant fraction of the total tariffs filed.[24] There may, of course, be cases where the ICC has reached a specific determination that would foreclose certain issues in an antitrust action.[25] When that

[24] In 1983 the ICC examined 188 tariffs out of 1.2 million filed, and suspended 11 (Pet. App. 14a n.3; see 1983 ICC Ann. Rep., Tables 6, 9, at 113-114 (1984)). By contrast, at the time *Keogh* was decided the total number of tariffs filed annually was approximately 8% of what it is today. See 1923 ICC Ann. Rep. 37 (94,780 tariffs filed). In view of the 1200% increase in tariff filings between 1923 and 1983, in today's regulatory environment the ICC's decision not to investigate a particular tariff surely cannot be regarded as tantamount to regulatory approval. See, *e.g.*, *MCI Communications Corp.* v. *AT & T*, 708 F.2d at 1104-1105 (where agency is able to investigate only a "small percentage" of 1,371 tariffs filed annually, tariff that agency has neither "dictated nor approved" is not immune from antitrust challenge). See also *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 593-594 (1976).

[25] Thus, a finding that the challenged conduct was within the terms of the approved Agreement would trigger express immunity under the Reed-Bulwinkle Act. Were respondents to contest whether their conduct in fact violated the ICC-approved Agreement, that issue might be

occurs, steps may be taken or rulings made, that are suitable to the circumstances.[26] But the fact that the relief sought in an antitrust damage action might in a particular case conflict with a specific ICC determination does not warrant the conclusion that, as a matter of law, no such antitrust damage actions should be permitted.

c. Because damage actions would not, as a theoretical or practical matter, interfere with the ICC's administration of the Interstate Commerce Act, the imposition of antitrust damage liability would not subject carriers to "duplicative and inconsistent" standards. As noted above, the primary initiative for setting rates rests with the carriers—not with the ICC. And as long as carriers comply with an ICC-approved agreement, they may collectively exercise the wide ratemaking discretion they have under the Interstate Commerce Act. But collective ratemaking

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referred to the ICC for determination in the first instance. See *Board of Trade* v. *ICC*, 646 F.2d 1187, 1193 (7th Cir. 1981). Similarly, if the ICC had in an administrative proceeding defined the lower bounds of reasonableness for a particular tariff (see, *e.g.*, *Iron & Steel Articles—Eastern Common Carriers*, 305 I.C.C. 369, 398 (1959) (prescribing a minimum tariff in order "to elevate such rates as are clearly below a compensatory level * * * thus ending destructive competition"), that finding would govern in an antitrust suit.

[26] The claim most likely to arise in an antitrust action that would require administrative resolution by the ICC is that the rate used for calculating antitrust damages would have been disallowed as "unreasonably" low. In cases where this argument seems plausible (cf. *Oilfield Equipment, Materials, & Supplies to & Between the Southwest*, 313 I.C.C. 577, 602 (1961) ("Our policy, stated in too many decisions to require citation here, is that our power to prescribe minimum rates should be sparingly exercised.")), bifurcation of the antitrust action into separate liability and damage proceedings will provide the ICC with an opportunity to exercise appropriate discretion. In many cases, of course, it may be entirely unnecessary to refer any damage-related issues to the ICC. Certainly no reference would be necessary if a plaintiff failed to establish liability, and in many cases the parties might find it advantageous to stipulate the appropriate range of reasonable rates in light of prior ICC determinations.

outside the scope of Reed-Bulwinkle immunity is naked price-fixing, condemned by both the Reed-Bulwinkle Act and the Sherman Act.[27] In this case, petitioners allege that the respondents have engaged in conduct that was not approved, and could not be approved, by the ICC. Accordingly, there is no merit to the argument that the imposition of antitrust liability would place carriers in a position where they cannot comply with the dictates of one statute without violating another.

II. PRIVATE DAMAGE ACTIONS WOULD FURTHER THE REGULATORY OBJECTIVES OF THE INTERSTATE COMMERCE ACT AS WELL AS RECENT CONGRESSIONAL EFFORTS TO PROMOTE COMPETITION IN THE TRANSPORTATION INDUSTRY

1. As the facts of this case demonstrate, carriers armed with *Keogh* immunity have a strong incentive to form cartels to engage in conduct that far exceeds the intent of Congress in conferring limited express immunity in the Reed-Bulwinkle Act. Because, as the court of appeals noted, *Keogh* shields even the most egregious violations of an ICC-approved Agreement from damage liability, it rewards carriers for violating both the Reed-Bulwinkle Act and the antitrust laws. Hence, the overruling of *Keogh* would foster compliance with both the antitrust laws and the Reed-Bulwinkle Act.

Congress was well aware of the potential evils of collective ratemaking. The legislative history of the Reed-Bulwinkle Act shows that Congress did not intend that carriers would be allowed to "go ahead and do as they please" under the Act (94 Cong. Rec. app. at A3926 (1948)). Instead, the Act sought to protect the public interest by opening the ratemaking process to participation

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[27] The ICC itself has taken the position that "relief from the antitrust laws * * * obtains only where the approved agreement is carried out strictly in conformity with its provisions and within the terms and conditions prescribed by this Commission." *Rate Bureau Investigation*, 349 I.C.C. 811, 824 (1975).

by shippers and the public.[28] At the same time, the Act guaranteed each carrier the right to take "independent action either before or after any determination arrived at" collectively (§ 5a(1)(B)(6), 62 Stat. 473; see also 49 U.S.C. 10706(d)(2)(C)). In providing open ratemaking procedures and protecting the individual carrier's right to take independent action, of course, Congress sought to protect the public interest. These two features were the quid pro quo for the antitrust immunity Congress conferred upon carriers.

The respondents in this case allegedly violated these two fundamental requirements of the Act by setting rates in a secret "Principals Committee" and by resorting to "threats, coercion and retaliation" to prevent carriers from exercising their statutory right to act independently. Obviously, if these allegations are true, respondents have also engaged in conduct that is illegal per se under the Sherman Act.[29] Allowing shippers to maintain antitrust damage actions in such circumstances would provide an effective incentive for carriers to comply with their ICC-approved agreements and thus would materially further the purposes of the Interstate Commerce Act. See *ICC* v. *American Trucking Associations, Inc.*, slip op. 13 (ICC overcharge remedy encourages "carriers to limit their collective activities to the areas that Congress described in the

[28] As Representative Bulwinkle explained, the "bill provides for complete publicity at every conference to protect the rights of the public" (93 Cong. Rec. app. at A3969 (1947)). In keeping with congressional intent, ICC approval of collective ratemaking agreements has always been conditioned upon various procedural requirements designed to safeguard shipper interests. See, *e.g.*, *Board of Trade* v. *ICC*, 646 F.2d 1187, 1192 (7th Cir. 1981).

[29] See R. Bork, *The Antitrust Paradox* 263 (1978) ("The subject of cartels lies at the center of antitrust policy. The law's oldest and, properly qualified, most valuable rule states that it is illegal per se for competitors to agree to limit rivalry among themselves.").

statutory guidelines"); *Georgia* v. *Pennsylvania R.R.*, 234 U.S. 439, 460-461 (1945) ("If the rate-making function is freed from the unlawful restraints of the alleged conspiracy, the rates of the future will then be fixed in the manner envisioned by Congress.").

2. Private damage actions would also further recent congressional efforts to promote competition in the essential domestic transportation industry. The size and importance of the industry are obvious: expenditures on domestic freight and passenger transportation consistently "account for approximately 20 percent of the Gross National Product" (D. Wyckoff & D. Maister, *The Motor Carrier Industry*, Table I-1, at xxv (1977)),[30] and the pricing of transportation services affects the price of virtually all other goods and services. Recent legislation affecting rail and motor carriers expresses a congressional determination that consumer welfare would be better served if carriers were subject, to a much greater extent than in the past, to the free play of competitive forces. In the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.*, Congress substantially reduced regulation of motor carriers, based on its conclusion that "protective regulation" had resulted in both "operating inefficiencies" and "anticompetitive pricing" (§ 3(a), 94 Stat. 793, 49 U.S.C.

[30] As of 1980, almost half of the motor carrier industry was subject to ICC regulation (see H.R. Rep. 96-1069, 96th Cong., 2d Sess. 2 (1980)), and that percentage is likely to increase as a result of the relaxed entry standards under the Motor Carrier Act of 1980. In 1982, total revenues in the domestic motor carrier industry (*i.e.*, ICC-regulated carriers and others) amounted to $178 billion, and motor carrier services accounted for 24% of total domestic transport ton-miles. Total revenues in the rail sector in 1982 amounted to $27.1 billion, and rail carrier services accounted for 36% of total domestic transport ton-miles. See Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States—1985*, at 587 (Table No. 1016); *id.* at 589 (Table No. 1022). Taken together, motor carrier and rail expenditures comprise approximately 90% of total domestic freight transportation expenditures. *Id.* at 587 (Table No. 1016); Motor Carrier Ratemaking Study Commission, *Collective Ratemaking in the Trucking Industry* 72 (1983).

10101 note (Congressional Findings and Declaration of Policy)).[31] Similarly, in both the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 *et seq.*, and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, Congress circumscribed the ICC's authority over rail rates. Most importantly, in both recent motor carrier and rail acts, Congress narrowed the scope of Reed-Bulwinkle immunity for collective ratemaking. For example, Congress has stripped carriers of immunity for joint setting of single-line rates, which are by far the most competitively significant rates.[32] Thus, Congress's intent with respect to both motor and

[31] Although the conduct forming the basis for the complaints here occurred largely if not entirely before the effective date of the 1980 Motor Carrier Act, the rule announced by the court of appeals appears broad enough to permit carriers to argue that post-1980 conduct is immunized as well. Moreover, petitioners' discovery prior to dismissal was limited primarily to jurisdictional matters; further discovery may reveal post-1980 conduct by respondents that violated both the ICC-approved Agreement and the antitrust laws. In any event, in the Motor Carrier Act of 1980 Congress determined that the regulatory scheme applicable prior to 1980 was deficient precisely because it resulted in anticompetitive pricing. This finding, and the legislative attention it prompted, undermine any argument that allowing an antitrust damage action for pre-1980 conduct outside the scope of express immunity under the Reed-Bulwinkle Act would frustrate congressional intent. Additionally, as demonstrated above, the decisional premises on which *Keogh* was based had been markedly superseded well before the 1980 legislation, and the practical limits of the ICC's regulatory oversight had been strained by the burgeoning number of tariff filings. Compare 1980 ICC Ann. Rep., Table 7, at 113 (1981) (605,538 tariffs filed in 1980), with 1923 ICC Ann. Rep. 37 (94,780 tariffs filed in 1923).

[32] See 49 U.S.C. 10706(a)(3)(A)(iii) (rate bureau may not "permit a rail carrier to discuss, to participate in agreements related to, or to vote on single line rates proposed by another rail carrier"); 49 U.S.C. 10706(b)(3)(D) (members of motor carrier rate bureau may not "discuss[ ] or vote upon single-line rates * * * July 1, 1984").

rail carriers—and especially their ratemaking—could not be clearer: competition rather than regulation is the order of the day.[33]

It would be consistent with that premise for this Court to remove the remaining judicially-crafted impediment to competition—*Keogh*'s prohibition of antitrust damage actions. The antitrust laws serve to protect competition in the American economy, and vigorous enforcement of those laws is essential. See, *e.g.*, *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *Northern Pacific R.R.* v. *United States*, 356 U.S. 1, 8 (1958). Moreover, while the United States has primary responsibility for antitrust enforcement, its resources for the detection of illegal conspiracies are limited. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344 (1979). As the Court stated only last Term, "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, No. 83-1569 (July 2, 1985), slip op. 20. Petitioners, of course, are particularly well-placed to enforce the antitrust laws effectively, for they are intimately familiar with the industry. At present, *Keogh* bars this important and beneficial private enforcement of the Sherman Act against a secret carrier cartel.

[33] See, *e.g.*, 49 U.S.C. 10101a(1) (in public interest "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail"); § 3(a), 94 Stat. 793, 49 U.S.C. 10101 note (Congressional Findings and Declaration of Policy) ("The Congress hereby finds that a safe, sound, competitive, and fuel efficient motor carrier system is vital to the * * * national economy."). See also Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.* (amending Federal Aviation Act of 1958 to "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services"). Preamble, 92 Stat. 1705.

If, as the court of appeals observed (Pet. App. 6a-7a), *Keogh* prohibits antitrust damage actions whenever the cartel members have filed tariffs, there will in essence be no private enforcement of the antitrust laws at all in this crucial sector of the economy.[34] Although Congress has greatly limited the ICC's authority over rates and decreed that competition rather than regulation should largely determine rates, it has not eliminated tariff filing requirements.[35] Accordingly, unless *Keogh*'s ban on private damage actions is lifted, congressional efforts to encourage competition will be anomalously thwarted: the public will lose the important protections formerly afforded by the Reed-Bulwinkle Act and at the same time it will be unable to rely on the potent incentive of private antitrust damage actions to ensure the competitive ratemaking that Congress expected.[36] Since Congress surely did

[34] Shippers presumably have little interest in bringing an injunctive action for past violations of an ICC-approved agreement that would result in, at most, a judicial declaration that carriers should comply with what remains of Reed-Bulwinkle's express immunity provisions.

[35] Allowing shippers to maintain antitrust damage actions would not be at odds with the "filed rate" principle that a "federally regulated [entity may not] charg[e] rates higher than those filed with the" relevant regulatory agency. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 573 (1981). Petitioners' claim is that they have been injured in their business or property as a result of a conspiracy among carriers that violated both the Reed-Bulwinkle Act and the Sherman Act. See 15 U.S.C. 15. The fact that rates other than those filed with the ICC pursuant to the conspiracy may be used to calculate the measure of antitrust injury does not transform an antitrust action into a collateral proceeding aimed at securing "a retroactive rate" decrease (453 U.S. at 578). Moreover, this Court has explicitly reserved the question whether the filed rate doctrine shields "affirmative misconduct" or "fraudulent conduct" such as that alleged here (*id.* at 583 & n.13).

[36] Cf. *Litton Systems, Inc.* v. *AT & T*, 700 F.2d 785, 806-807 & n.30 (2d Cir. 1983), cert. denied, No. 82-2128 (Jan. 16, 1984) (noting various federal tariff filing requirements; rejecting contention that mere filing of tariff provides antitrust immunity because "[i]f this argument were accepted, a common regulatory practice designed to protect consumers would instead shield from antitrust liability the very entities the practice seeks to restrain and regulate").

not intend " 'to paralyze with one hand what it sought to promote with the other' " (*Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 631 (1973), quoting *Clark* v. *Uebersee-Finanz-Korp.*, 332 U.S. 480, 489 (1947)), it is time for this Court to overrule *Keogh*.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with directions that petitioners' complaints be reinstated in their entirety.

Respectfully submitted.

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